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THE MEMING OF SUBSTANTIVE DUE PROCESS

*Jamal Greene**

Substantive due process is notoriously regarded as a textual contradiction, but it is in fact redundant. The word “due” cannot be honored except by inquiring into the relationship between the nature and scope of the deprived interest and the process—whether judicial, administrative, or legislative—that attended the deprivation. The treatment of substantive due process as an oxymoron is what this Essay calls a constitutional meme, an idea that replicates through imitation within the constitutional culture rather than (necessarily) through logical persuasion. We might even call the idea a “precedent,” in the nature of other legal propositions within a common law system. This Essay explores the intellectual and social history of the substantive-due-process-as-contradiction meme and argues that it is often appropriate for judges to rely upon such memes even if their underlying claims lack analytic integrity. Judicial opinion writing in constitutional cases is best understood as an act of translation between the decisional process of the judge and the representations necessary to validate the decision within the constitutional culture.

INTRODUCTION

Substantive due process is not a contradiction in terms.¹ Indeed, it is redundant. No inquiry into the propriety of some process—its “due”-ness—is or can be indifferent to the substance of the associated loss. Due process contemplates a rule of reason that calibrates the relation between, on one hand, the nature and

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1. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 18 (1980).

scope of a deprivation and, on the other, the process that attends it.² For some deprivations, a simple majority vote in the legislature and the signature of the executive is sufficient process; for others, more, even a constitutional amendment, may be required. It would beg the question to pronounce, *tout court*, that any particular legislative process is always constitutionally adequate. It would turn the word “due” into surplus.³

It has somehow become common ground across the ideological spectrum that a textual analysis of this sort fails.⁴ These days, the most damning charge against substantive due process is not that it gets the history wrong or that it unduly empowers judges, both of which might be accurate, but rather that it abuses the English language, which is not. Part of this Essay’s project, then, is to shift the terrain on which the battle over the Due Process Clause is waged. Standing alone, the constitutional text supports substantive due process because the word substantive, to repeat, is redundant. Part I makes this case. It argues that neither “substantive” nor “procedural” due process holds superior title to the phrase “due process of law” or, at the least, that staring at the Constitution contributes nothing to the argument.⁵

2. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970).

3. See Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 330 (2012) (“A procedure-only approach to due process cannot account for the meaning of the word ‘due.’”).

4. See *id.* at 284 (“[F]or decades it has been a commonplace of law schools that substantive due process is an oxymoron . . .”). In addition to Ely, see, for example, *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982) (calling substantive due process “the ubiquitous oxymoron”); *McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring the judgment) (“The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.”); CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* 91 (1997) (“Now when you say those words ‘substantive due process’ over and over, you must see . . . that the phrase is incorrigibly self-contradictory.”); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1071 (1984) (referring to “the awful oxymoron of substantive due process”); Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1531 (2008) (“For me as an originalist, the very notion of substantive due process is an oxymoron.”); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 897 (2009) (calling substantive due process a “made-up, atextual invention”).

5. Debates over the conceptual difference between substance and process in the context of due process of law are of long standing. For a flavor of the various positions, see, for example, Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV.

It would be valuable enough to stop there. For as central as the Due Process Clause has been to constitutional law over the last century, the inconsistency of *Griswold v. Connecticut*⁶ and its progeny with the constitutional text is no longer contested.⁷ As time has passed, the weight of stare decisis has crowded out any affirmative textual argument in favor of “substantive” due process. The Court itself said three decades ago in a unanimous opinion that substantive due process is not suggested by the Constitution’s language and indeed “is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.”⁸ This concession tends to stunt the growth of the doctrine and places supporters of particular constitutional rights—especially to sexual and reproductive autonomy—unnecessarily on the defensive. It also poses a dilemma for teachers of constitutional law, who must indoctrinate into students a textual difference between “substantive” and “procedural” due process that disappears on reflection.

As Part II explains, it was not always thus. Substantive due process was a phrase seldom used in constitutional law until at least the 1960s, and its prominence rose dramatically in the 1980s when legal conservatives (and some liberals) began to lampoon it as a textual anomaly. It was not, as some would have it, a careless Warren Court innovation, repurposed from the Gilded Age and exposed for its absurdity after the rise of textualism. In fact, from the dawn of the Fourteenth Amendment up until the Warren Court, invocations of due process were frequently what we would now call “substantive” due process, and attacks on the doctrine were not usually based on the Constitution’s text, which is too vague to contradict much of anything. The term substantive due process was part of the rhetorical process that made *Lochner v. New York* an anticanonical precedent, one that is repeatedly and (nearly) universally cited as an example of badly misguided

85. Whether or not there is a conceptual difference, I do believe there is a practical difference, as noted below. See Part I *infra*.

6. 381 U.S. 479 (1965).

7. This is true of both the Fifth and the Fourteenth Amendment Clauses. As this Essay focuses on the text rather than the history of the provisions, I use the clauses interchangeably unless noted. For discussion of potential differences between the two clauses, see Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

8. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–26 (1985) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 543–44 (1977) (White, J., dissenting)).

constitutional decision making.⁹ *Lochner*'s anticanonicity came about in the 1970s and flourished in the 1980s as part of the case against sexual privacy and abortion rights. Substantive due process was a phrase largely created by its enemies and attributed to its supporters in a strategic assault on particular Court decisions.

Part III sorts out the implications of this story for the role of analytic integrity in the formation of constitutional arguments. Whether or not substantive due process is logically a contradiction in terms, its status as an oxymoron has become what I call a constitutional meme. A meme is a cultural element—a word, an idea, a set of assumptions—whose growth and evolution are sometimes said to mimic genetic transmission.¹⁰ A constitutional meme is one passed among and through generations of lawyers, scholars, and judges as the conventional wisdom of constitutional law. The wrongness of *Lochner*, the unamendability of the Constitution via Article V, the tiers of scrutiny framework, and the textual absurdity of substantive due process each exemplifies a constitutional meme. Each is an idea, a cluster of information, so deeply embedded that it is often stated without further proof or elaboration and resists counterargument.¹¹

Constitutional memes are vital to constitutional law. We can understand constitutional law as a set of resources for making

9. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

10. See e.g., RICHARD DAWKINS, *THE SELFISH GENE* 215 (1976).

11. Each of the examples noted in the text is notionally vulnerable to counterargument. *Lochner* is consistent with a culture of rights, a concern for minority political representation, and (arguably) the original understanding of the Due Process Clause. See Greene, *supra* note 9, at 417–22; see also DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2012). The U.S. Constitution is infrequently amended in comparison to many in the world, see ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009), but it is far from obvious whether this textual stability is structurally determined or is instead a dynamic feature of the prevailing constitutional culture. See Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty* (Coase-Sandor Institute for Law & Economics, Working Paper No. 682, 2014); see also JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 69–72 (2013) (arguing that the Article V amendment process has not been too strict to prevent substantial political change). The descriptive imprecision of the tiers of scrutiny framework is well-known, see, e.g., James E. Fleming, *"There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301 (2006), even as departures from the framework continue to form the basis for criticism of the Court's work. See Russell K. Robinson, *Unequal Protection*, 67 STAN. L. REV. 151 (2015).

constitutional arguments. Those resources fall within a limited number of domains—the text, historical materials, precedents, prudential arguments, and so forth. Close cases arise when advocates for divergent positions both have substantial resources to draw upon within these domains. Constitutional doctrine does not depend on which set of resources provides correct answers in some metaphysical sense; it depends on who successfully persuades judges and other legal officials who enjoy decision-making authority. Invoking constitutional memes can help to persuade decision-makers by narrowing the ground of argument in ways that are favorable to one's position.

Judges operate subject to ethical obligations extending beyond the need to persuade decision-makers, and that may temper their resort to memes that are rhetorically useful but false. But the epistemological structure of constitutional law does not permit constitutional judges to ignore altogether the demands of persuasion. They must, in effect, translate their decisions into a language susceptible to validation by the public that constitutional law ultimately serves. The act of translation can place a judge in the uncomfortable but unavoidable space between legal fictions and lies.¹²

I

Substantive due process is often defined but rarely with precision. John Hart Ely's quip that substantive due process is a contradiction in terms—"sort of like 'green pastel redness'"¹³—is as famous as anything ever said in a constitutional law monograph, but the ubiquity of the quip should raise suspicion as to its analytic clarity.¹⁴ Ely describes his target as the view that the

12. Cf. JEREMY BENTHAM, BENTHAM'S THEORY OF FICTIONS 141 (C.K. Ogden ed., 1932) ("What you have been doing by fiction—could you, or could you not, have done it without the fiction? If not, your fiction is a wicked lie: if yes, a foolish one. Such is the dilemma. Lawyer! [E]scape from it if you can.").

13. ELY, *supra* note 1, at 18.

14. Universal or near-universal assent is sometimes said to be a measure of truth. See John Finnis, *Natural Law and the Ethics of Discourse*, 43 AM. J. JURIS. 53, 54 (1998) (describing the Platonic viewpoint). Often this claim assumes not only some form of rational deliberation and reflective judgment on the part of participants but it also may assume that individuals are more likely than not to be right. See H. .lène Landemore, *Collective Wisdom: Old and New*, in COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 2 (H. .lène Landemore & Jon Elster eds., 2012). Cf. JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS*

Due Process Clause “incorporat[es] a general mandate to review the substantive merits of legislative and other governmental action.”¹⁵ Justice Scalia, the most prominent modern critic of the doctrine, writes:

By its inescapable terms, [the Due Process Clause] guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require—notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.¹⁶

In the same vein, Robert Bork insists that the Due Process Clause “is simply a requirement that the substance of any law be applied to a person through fair procedures by any tribunal hearing a case [and] says nothing whatever about what the substance of the law must be.”¹⁷ Laurence Tribe writes that the text of the provision “suggests a guarantee that, *whatever the substance of the rules of conduct government promulgates*, those rules may not be brought to bear on any person so as to deprive that person of life, liberty, or property without fair procedures—such as a hearing before a neutral decisionmaker.”¹⁸ Richard Posner has called substantive due process a “durable oxymoron” whereunder “persons harmed by state regulation [may] complain that the regulation is so unreasonable a deprivation of life, liberty, or property that it is unconstitutional even if adopted and applied in conformity with the most rigorous procedural safeguards.”¹⁹

(2004)). Unanimity may reflect a lack of textured analysis or incomplete theorization. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995). The Talmudic puzzle that unanimity on the Sanhedrin led to acquittal seems to adopt some version of this reasoning—a unanimous verdict suggests a troubling lack of independent judgment. See Emphraim Glatt, *The Unanimous Verdict According to the Talmud: Ancient Law Providing Insight Into Modern Legal Theory*, 3 PACE INT’L L. REV. ONLINE 316, 324–25 (2013).

15. Ely, *supra* note 1 at 15.

16. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 24–25 (Amy Gutmann ed., 1997).

17. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 31 (1990).

18. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1332–33 (3d ed. 2000).

19. *Ill. Psychological Ass’n. v. Falk*, 818 F.2d 1337, 1342 (7th Cir. 1987); *accord* *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982) (calling substantive due process “the ubiquitous oxymoron”).

An example may help to diagnose the inadequacy of these formulations as criticisms of substantive due process. The Court's recent, controversial expansion of the Due Process Clause to condemn prohibitions on same-sex marriage supplies a ready hypothetical. Let us turn back the clock to the day before the Court's decision in *Obergefell v. Hodges*.²⁰ Suppose a county registrar refuses to issue a marriage license solely on the ground that the two people who wish to marry are both men. In this particular state, the state constitution defines marriage as the union of a man and a woman. The couple sues, arguing that an agent of the state has deprived them of liberty without due process of law in violation of the federal Constitution. According to Ely, Scalia, Bork, Tribe, and Posner—an august, eclectic bunch—this claim does violence to the text (a charge that would bother some more than others).

But why? Getting married is a liberty, indeed one previously recognized as fundamental by the Supreme Court,²¹ and denial of a marriage license constitutes a deprivation of that liberty. The denial was effected by a process of law, namely a state constitutional amendment. And the couple's claim is that this process is not the one “due” to them in light of the significance of the deprived interest. A more rigorous legal process—for example, a federal constitutional ban on same-sex marriage—would have extinguished the couple's constitutional claim. A less rigorous but categorically distinct legal process—a determination by a Supreme Court majority that the state had sufficient reason to deny the license and that its denial bore a sufficient relationship to that interest—also would have extinguished the couple's claim. As it turns out, the state's process for effecting its deprivation of liberty was held to be inadequate—*i.e.*, not due—and hence the availability of same-sex marriage is now the law of the land.

On this view, substantive due process is not, as Ely would have it, a mandate to review the “merits” of governmental action but is instead a mandate to determine which of a long menu of procedural boxes fits a particular kind of state deprivation. Justice Scalia is right that the text speaks of process, but in adding that “process” means a “validly enacted law and a fair trial,” he

20. 135 S. Ct. 2584 (2015).

21. See *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978). But see *Obergefell*, 135 S. Ct. at 2635–37 (Thomas, J., dissenting) (arguing that the Due Process Clause does not protect positive liberties).

concedes that the clause requires judges to determine which laws are validly enacted and which trials are fair. These are substantive questions. Accordingly, Judge Bork cannot mean that the Due Process Clause requires only that the substance of "any" law be applied through fair procedures; he would insist, I assume, that the clause further require, as Justice Scalia implies, that those laws be enacted by constitutionally competent lawmakers. And who is competent to enact a particular law must depend, in part, on what the law does. Likewise, Professor Tribe skips a step when he takes "the rules of conduct government promulgates" as given rather than as the outcome of a process whose fairness must be matched to the nature and scope of the deprived life, liberty, or property. Finally, it is simply wrong, pace Judge Posner, to say that a substantive due process claimant thinks *no* procedural safeguard would be adequate to justify the deprivation, since a valid constitutional amendment or a law passed in satisfaction of strict judicial scrutiny would suffice (even if they are not the relief the claimant seeks). Put another way, the claim is not that a challenged deprivation may not occur *regardless of* the process that attends it; it is that the deprivation may not occur *in light of* the process that effected it.

Conceived in this way, it is easy to see how due process may be conceptualized along a loose (and perhaps overlapping) spectrum from what we tend to see as its procedural to its substantive elements. This is so because multiple ambiguities enable a diversity of "processes" to satisfy the textual commands of the Due Process Clause.²² For a relatively minor deprivation, such as the \$23.50 in hobby materials allegedly lost by Nebraska corrections officials in *Parratt v. Taylor*,²³ due process of law might be no more than the availability of a state tort system. For a more serious deprivation, such as the loss of life-sustaining but statutorily defined welfare benefits in *Goldberg v. Kelly*,²⁴ a pre-deprivation administrative hearing is "due." For marginal deprivations of certain fundamental rights, ordinary, non-arbitrary legislation might be enough,²⁵ but for absolute

22. Easterbrook, *supra* note 5, at 90 ("The language of the [Due Process Clauses] . . . could mean just about anything.").

23. 451 U.S. 527, 529 (1981).

24. 397 U.S. 254 (1970).

25. See *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (Joint Op.); *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978).

deprivations, the Constitution must be amended or the legislation must be subject to review by an independent adjudicator—a panel of judges—employing certain standards of necessity and fit.²⁶

The path from procedural to substantive requirements for legislative or judicial review is not necessarily linear in respect to the severity of the deprivation. Bert Taylor, Jr. could likely have raised a substantive due process objection had his \$23.50 in hobby materials been deprived intentionally rather than negligently,²⁷ but John Kelly had no substantive entitlement to intentionally deprived benefits that had kept him from homelessness.²⁸ Still, the language of “fundamental” rights as the trigger for substantive due process suggests that strict scrutiny or constitutional amendment are the bulwarks against deprivations that are categorically more substantial than the ordinary liberty and property interests that trigger procedural due process protection.

Claims that substantive due process doctrine describes an approach to a set of rights whose deprivation is *never* allowed, no matter the process,²⁹ apply only to absolute, non-derogable rights.³⁰ It is possible that such rights exist in the American system—the right against genocide, say³¹—but the steady assault on substantive due process does not have these kinds of *jus cogens* norms in mind.

Two overlapping objections deserve elaboration. First, there is a pleading issue. A procedural due process claim typically prays for procedural protection to attach to the complained of deprivation. A substantive due process claim does not typically

26. *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 189 (2008); *Zablocki*, 434 U.S. at 388.

27. Indeed, though *Parratt* was decided as a procedural due process case, Richard Fallon has argued that because Taylor complained that the state lacked adequate reasons for affecting the loss of his hobby materials, the underlying grievance was better understood in substantive due process terms. See Richard H. Fallon, Jr., *Some Confusion About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 341–44 (1993); see also *Parratt*, 451 U.S. at 552–53 (Powell, J., concurring in the result) (noting that the Court’s holding that there had been a deprivation in a constitutional sense raises the possibility that the state violated substantive due process).

28. See *Dandridge v. Williams*, 397 U.S. 471, 477–78 (1970).

29. See *Reno v. Flores*, 507 U.S. 292, 302 (1993).

30. See Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 882 (2003). Even this is debatable, since the word “due” could arguably contemplate that for certain deprivations, no process could justify them.

31. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 702(a) & cmt. n.

pray for a constitutional amendment or for strict judicial scrutiny and no more. The crux of the complaint is that the deprivation should be voided; conditional relief giving the jurisdiction the opportunity to amend the Constitution would be not just procedurally odd but would greatly displease the plaintiff. The sense in which a claim is substantive rather than procedural in nature pertains to the relief the plaintiff *seeks*, not the relief that would eliminate his cause of action. The plaintiff's substantive due process complaint directs the court's energy towards whether the law is a proper one, which is an unmistakably substantive question, distinguishable from questions of notice, an opportunity to be heard, the availability of counsel, and burdens of production and persuasion.

Any claim that substantive and procedural due process do not involve distinct analysis would need to meet this objection, but that is not this Part's claim. The distinction between substantive and procedural due process is intelligible, even if there is significant ambiguity on the margins. A due process violation requires that the asserted life, liberty, or property interest pass some threshold of importance and that it be deprived without crossing some other threshold of regularity or consistency with the way in which meaningfully similar rights are deprived. Substantive due process claims focus on the first of these thresholds while procedural claims focus on the second, and in both cases it is typically assumed that the *other* threshold has been crossed. Thus, these argument types are indeed distinct, and constitutional lawyers, judges, and scholars tend to know them when they see them. The claim of this Part is simply that the same text—"nor shall any state deprive any person of life, liberty or property, without due process of law"—accommodates both argument types.

A second objection to the analysis in this Part is grounded in the difficulty in severing textual argument from doctrine and history. The hypothetical substantive due process claim that opens this Part seems to track the words of the Due Process Clause and, if successful, vindicates the couple's substantive interest in marrying each other. But lawyers, especially those trained in common law systems, will immediately, indeed instinctively, see a problem with this proposed reconciliation. Some might argue that neither a constitutional amendment nor judicial application of strict scrutiny counts as a "process" within

the meaning of the term “due process of law.” The processes the Due Process Clause contemplates are those such as notice of adverse claims, an opportunity to be heard before a neutral decisionmaker, with the benefit of counsel and certain evidentiary protections, and so forth. Perhaps a handful of those lawyers will allow that the Due Process Clause might be concerned as well with the legislative procedures attending a challenged law, or to the process of judicial review itself. But in that case, the kinds of infirmities that would make these processes “undue” are not what our hypothetical has in mind. An “undue” legislative process is one that, say, lacks a quorum, operates under a non-majoritarian voting rule, or includes unelected legislators.³² An “undue” judicial review process is one conducted by a biased or (literally) incompetent judge.³³ The notion that the process of ordinary lawmaking is not “due” because an interest is sufficiently fundamental to require a process of constitutional amendment, or that the process of rational basis judicial review is not “due” because the interest at stake requires strict scrutiny, will strike the common lawyer as casuistic.

Whatever the virtues of this effort to recover a textual argument against substantive due process, it does not rely on the text, at least not in a way that Ely’s joke has the resources to describe. For illumination, consider an example borrowed from Lon Fuller, which he in turn borrowed from John Austin.³⁴ Austin puzzled over the erstwhile English legal fiction, expounded by Blackstone, that “husband and wife are one person.”³⁵ Austin writes, “I rather impute such fictions to the sheer imbecility (or, if you will, to the active and sportive fancies) of their grave and venerable authors, than to any deliberate design, good or evil.”³⁶

32. See Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 240 (1976).

33. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (holding that due process of law requires judicial recusal where significant judicial election contributions by a litigant to a judge in his or her case create an appearance of bias); *Crowell v. Benson*, 285 U.S. 22 (1932) (permitting administrative adjudication of private rights so long as final adjudication was available in Article III courts); Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1 (2014) (arguing that judicial elections violate the Due Process Clause).

34. See L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 387 (1930).

35. 2 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE: OR, THE PHILOSOPHY OF POSITIVE LAW* 630 (1873); see also 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765-1769) 442-45.

36. AUSTIN, *supra* note 35, at 631.

From a narrow perspective, it would be oxymoronic to say that husband and wife are one person, no less than to say that two is equal to one.

But as Fuller notes, Austin's complaint was not really against the use of language but rather against the claim being made about the legal relation between husband and wife.³⁷ Even from the internal perspective of English law, husband and wife were not a unit for all purposes: "When it is said . . . 'that husband and wife are one person,' the meaning merely is, that they lie under certain incapacities with respect to one another. And where those incapacities do not intervene, the fiction of their unity ceases, and they are deemed *twain*."³⁸ Calling the phrase "imbecilic" draws rhetorical leverage from the absurdity of the language, taken narrowly, but Austin's disagreement with Blackstone is, in the end, a legal dispute, and a pedantic one at that. Fuller likens "husband and wife are one" to the statement, "A has a legal right against B to payment of \$100."³⁹ Knowing that A has a legal right does not, without more, tell us "whether A may forcibly take \$100 from B's pocket, nor whether A may have B jailed if B refuses to pay the \$100. For the particulars, [we] must go elsewhere."⁴⁰

Likewise, to understand why substantive due process sounds oxymoronic requires more than a knowledge of the English language. For the particulars, we must tap into a certain, and notably incomplete, legal tradition. Abstracted from any such tradition at a particular point in time, "due process of law" is a meaningless string of words.⁴¹ It acquires meaning as a legal term through its use in the law. The strongest version of this point would draw on the hermeneutic tradition and observe that all language is culturally and temporally situated, such that no phrase whose meaning is understood by its speakers or listeners could possibly be a nonsensical juxtaposition of opposites. "Jumbo shrimp" evokes RED LOBSTER®, not confusion. Indeed, we might better define an oxymoron not as a contradiction-in-terms but instead as a paradox, a superficial internal tension that abates

37. See Fuller, *supra* note 34, at 387.

38. AUSTIN, *supra* note 35, at 630.

39. Fuller, *supra* note 34, at 388.

40. *Id.*

41. See Easterbrook, *supra* note 5, at 90.

on reflection.⁴² Substantive due process is just such a paradox, and so calling it an oxymoron reflects rather than undermines its inherent consistency.

But we need not take a detour into the philosophy of language to understand that “due process of law” has meant different things to different actors at different points in the history of American law. No less an authority than Antonin Scalia provided a guided tour of those meanings in his concurring opinion in *Pacific Mutual Life Insurance v. Haslip*.⁴³ The *Haslip* Court rejected a substantive due process claim by an insurance company complaining about the size of a punitive damages award. Justice Scalia agreed with the judgment but would have held that any procedurally sound punitive damages award that did not violate the Bill of Rights satisfied the Due Process Clause.⁴⁴ In so arguing, he offered a standard account of the origins of the due process language in the U.S. Constitution.

The clause seems first to have appeared in a 1354 English statute: “No man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.”⁴⁵ Despite conflicting historical evidence,⁴⁶ the English jurist Sir Edward Coke thought the term was identical to the phrase “Law of the Land” (*per legem terrae*) as used in Chapter 39 of the Magna Carta:

No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.⁴⁷

42. See Marvin K.L. Ching, *A Literary and Linguistic Analysis of Compact Verbal Paradox*, 26 COLLEGE COMPOSITION & COMM. 384, 384 (1975).

43. *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 24 (1990) (Scalia, J., concurring in the judgment).

44. See *id.* at 24–25.

45. *Id.* at 28 (quoting Liberty of Subject, 1354, 28 Edw. 3, ch. 3 (Eng.)).

46. See Keith Jurov, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 267 (1975) (“[T]he provision seems merely to require that the appropriate writ be used to summon the accused before the court to answer the complaints against him.”).

47. *Haslip*, 499 U.S. at 28 (Scalia, J., concurring in the judgment) (quoting 9 Hen. III, ch. 29 (1225)); See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *351–*353 (1st ed. 1868).

The “law of the land” meant the customary adjudicative procedures under the English common law.⁴⁸

American colonists, familiar with Coke, incorporated “law of the land” language into eighteenth century state constitutions, and the same basic meaning—according to customary English procedures—survived as the due process clause of the Fifth Amendment to the U.S. Constitution.⁴⁹ In *Murray’s Lessee v. Hoboken Land & Improvement Co.*,⁵⁰ decided in 1856, the Court affirmed Coke’s translation but also noted that the provision constrained “the legislature as well as . . . the executive and judicial powers of the government.”⁵¹

The Court’s first significant elaboration of the meaning of the clause subsequent to the adoption of the Fourteenth Amendment came in *Hurtado v. California*, an 1884 decision in which a convicted murderer argued, unsuccessfully, that due process of law required a grand-jury indictment.⁵² Justice Scalia’s *Haslip* concurrence takes from *Hurtado* that historical practice is sufficient but not necessary to qualify as due process of law.⁵³ A procedure not blessed by history would be invalid if it failed to comport with “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”⁵⁴ Justice Scalia’s opinion notes that by 1934, when the Court decided *Snyder v. Massachusetts*,⁵⁵ consistency with the principles of “fundamental justice” seemed to have become a necessary condition of all procedures to satisfy the Constitution.⁵⁶

Although historical practice carried great and perhaps dispositive weight according to the *Snyder* Court, Justice Scalia writes that incorporation of the Bill of Rights against the states caused cleavage between historical practice and what the Bill of Rights required.⁵⁷ The Court came to the view that its own

48. See *Haslip*, 499 U.S. at 28 (Scalia, J., concurring in the judgment).

49. *Id.* at 29.

50. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

51. *Id.* at 276.

52. *Hurtado v. California*, 110 U.S. 516 (1884).

53. *Haslip*, 499 U.S. at 31–32. Justice Scalia’s opinion understates the breadth of the *Hurtado* Court’s reading of the Fourteenth Amendment. See *infra* note 64 and accompanying text.

54. *Id.* at 32 (quoting *Hurtado*, 110 U.S. at 535).

55. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

56. See *Haslip*, 499 U.S. at 33 (Scalia, J., concurring in the judgment).

57. See *id.* at 34–35.

interpretations of the Bill of Rights, developed in the context of exclusive application to the federal government, also set a lower bound for what qualified as fundamental fairness. This conflation meant that states that violated the Bill of Rights as previously defined by the Court automatically violated the Due Process Clause of the Fourteenth Amendment.⁵⁸ Over time, and unsurprisingly, the Court began to understand the Due Process Clause to prohibit any practice that failed a test of “fundamental fairness,” no matter its historical pedigree and no matter its relationship to the specific guarantees of the Bill of Rights.⁵⁹ In *Haslip*, decided a quarter century ago, Justice Scalia’s opinion traces this analysis to “due process opinions in recent decades.”⁶⁰

Justice Scalia’s tour of the history of the Due Process Clause effectively makes the point that substantive due process is not a contradiction in terms. Due process of law is meaningless in the abstract, extracted from its historical situation. It once seems to have meant according to “specific writs employed in the English courts.”⁶¹ Later, it meant “according to the law of the land,” a phrase that itself seemed to refer to customary English procedure. Later, it meant “according to traditional practice” or “according to the tenets of fundamental justice.” Later, and for at least the past several decades, it has meant “according to principles of fundamental fairness,” a concededly substantive standard.

And there is more. At least two other definitions of due process of law emerged during the early and middle decades of the nineteenth century and thus can be assumed to have influenced the drafters of the Fourteenth Amendment.⁶² On one view, due process of law would be violated by a law that defeated vested property rights by denying compensation after a taking or by transferring property from one private person to another.⁶³ On another related but broader view, due process of law required that laws be appropriately general and prospective rather than class-

58. See *id.* at 35.

59. See *id.* at 36.

60. *Id.* at 36 (emphasis added).

61. *Id.* at 28.

62. See Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 375 (1911); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 498 (1997); Williams, *supra* note 7, at 416, 423–25.

63. See Harrison, *supra* note 62, at 506–20.

based, retrospective, or arbitrary.⁶⁴ On either view, the Due Process Clause binds the legislature and extends beyond mere procedural regularity. Note as well that just about everyone agrees that the American usage of “due process of law” is synonymous with “by the law of the land,” a phrase that, though likely a reference to procedures, does not explicitly refer to process.⁶⁵ Was *per legem terrae* also a contradiction in terms? Or is it rather that the text is not literal and therefore not susceptible to denotation as an oxymoron in any but a trivial sense?⁶⁶

Justice Scalia has exhaustively worked out a theory that tells us which of the many definitions of due process of law is the one judges in constitutional cases should adopt.⁶⁷ But to say that the traditional understanding of a legal term (much less one traditional understanding among others) just *is* its current textual meaning confuses a theory of language with a theory of interpretation.⁶⁸ And so, as we might have suspected all along, the claim that substantive due process is a contradiction in terms is really just a volley in the eternal debates over constitutional interpretation. Those debates are deeply contested and it really is very helpful for one side to be able to say, credibly on the surface, that the other side’s position disobeys the rules of English. Revealing the sparseness of the textual argument against substantive due process unstacks the deck.

II

As noted, inconsistency with the text is hardly the sole objection to substantive due process. One could reject substantive due process for at least as many reasons as there are forms of

64. See *Hurtado v. California*, 110 U.S. 516, 535–36 (1884) (“It is not every act, legislative in form, that is law . . . It must be not a special rule for a particular person or a particular case, but . . . ‘the general law,’ . . . and thus [excludes] . . . special, partial, and arbitrary exertions of power under the forms of legislation.”).

65. Although many scholars doubt that Coke was right to equate the phrases, see, e.g., Corwin, *supra* note 62, few doubt that Americans relied on Coke’s views. See Charles M. Hough, *Due Process of Law—To-day*, 32 HARV. L. REV. 218, 218 (1919).

66. It would then not be a contradiction in terms but would be a true oxymoron—a term whose literal sense is not interesting. See Brian Cummings, *Literally Speaking, or, the Literal Sense from Augustine to Lacan*, 21 PARAGRAPH 200, 218 (1998).

67. See generally SCALIA, *supra* note 16 (expounding textualist-originalist theories of interpretation).

68. Cf. Fuller, *supra* note 34, at 377 (arguing that the claim that a word is a fiction “must be based ultimately on the notion that the word . . . has reached the legitimate end of its evolution and that it ought to be pinned down where it now is”).

orthodox constitutional argument. One could argue that it is inconsistent with the intentions or understandings of the framers of the Fifth or Fourteenth Amendments; that it resurrects repudiated precedents such as *Lochner* or *Dred Scott*; that it requires substantive value judgments in a Constitution that prizes judicial regulation through procedure; or that it encourages judges to engage in policymaking at the expense of democracy. We have heard all of these complaints before. It would be surprising if no one before Ely thought to supplement these arguments with the simple observation that substantive due process is a nonsense phrase that makes hash of the text, but that isn't far from the truth. The phrase "substantive due process" has been in legal circulation since at least the 1920s,⁶⁹ but it is surprisingly difficult to find criticisms of either the term itself or its underlying concept that are framed in *textual* terms prior to the 1980s.

In fact, I am aware of only three authors to have referred to substantive due process as either an oxymoron or a contradiction in terms before Ely did so in 1980.⁷⁰ The earliest such reference appears in a 1956 Canadian law review article by W.F. Bowker, who was then the dean of the law school at the University of Alberta.⁷¹ Bowker was comparing property rights in Canada and the United States and noted that although the Due Process Clause seemed to place no substantive limitations on legislation affecting property rights, it had been interpreted otherwise. "Thus," Bowker wrote, "grew the concept of 'substantive due process,' a contradiction in terms to be sure, but one that for about a half a century ending just before World War II operated to impose severe restrictions on economic legislation."⁷²

The second reference comes in historian Leonard Levy's introduction to Robert McCloskey's classic defense of economic due process that appears in an edited volume of essays on the U.S.

69. See, e.g., Note, *Constitutionality of Judicial Decisions in Their Substantive Law Aspect Under the Due Process Clause*, 28 COLUM. L. REV. 619, 619 (1928) (defining "substantive due process").

70. I do not doubt that there are others, but I have not found them.

71. See W.F. Bowker, *Protection of Basic Rights and Liberties*, 2 U. B.C. LEGAL NOTES 281, 311 (1956).

72. *Id.* at 311.

Constitution.⁷³ Levy criticizes McCloskey for failing to acknowledge that substantive due process “was always a judicially contrived, oxymoronic concept that distorted history, logic, and plain meaning.”⁷⁴ The certitude of Levy’s skepticism here is mysterious. Levy has in other writing conceded that a version of substantive due process is historically available (if inconclusive), and moreover that the Due Process Clause is “written in language that blocks fixed meanings.”⁷⁵

Finally, Hermine Herta Meyer, a Justice Department lawyer, referred to substantive due process as “self-contradictory,” “a contradiction in terms,” and “an invention of American judges” in a 1972 law review article defending the pretrial detention procedures of the District of Columbia Court Reform and Criminal Procedure Act of 1970.⁷⁶ Meyer’s article appears to have been part of a coordinated effort by members of the Nixon Justice Department to influence how courts would treat legislative bail reform.⁷⁷ Meyer later called substantive due process a “nonsense phrase” in her 1977 book on the history of the Fourteenth Amendment published by the vanity publisher Vantage Press.⁷⁸

It is perilous to draw conclusions from this small (and likely under-inclusive) sample of pre-1980s references to the internally contradictory character of substantive due process, but it is difficult not to notice that none of the three was a lawyer raised in the United States. Bowker was a Canadian lawyer, Levy a non-lawyer born in Canada, and Meyer a German lawyer who immigrated to the United States as an adult. This coincidence suggests (if dimly) the possibility that a superficially available textual argument against substantive due process was nonetheless

73. Leonard W. Levy, *Introduction* to Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, in *AMERICAN CONSTITUTIONAL LAW: HISTORICAL ESSAYS* 157 (Leonard W. Levy ed., 1966).

74. *Id.*

75. LEONARD W. LEVY, *SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY* 120 (1995).

76. Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 *GEO. L.J.* 1381, 1417 (1972).

77. See Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 *ARIZ. L. REV.* 909, 958-59 (2013).

78. HERMINE HERTA MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT* 127 (1977).

foreign to the American legal culture.⁷⁹ The canonical critique was located outside the text.

The origin of substantive due process is sometimes traced to Chief Justice Taney's lead opinion in *Dred Scott*.⁸⁰ This accusation (*le mot juste*) is better rhetoric than it is legal history,⁸¹ but its accuracy is not presently important. It is enough to say that the opinion may plausibly be read as holding that a law prohibiting slavery in federal territories violates the Fifth Amendment's Due Process Clause because it deprives slaveholders of vested property rights in their slaves.⁸² The dissenters, Justice McLean and Justice Curtis, disputed this holding on the merits but neither of them questioned the applicability of the Due Process Clause as a substantive limitation on legislative activity.

Likewise, in *Lochner v. New York*, the chief error of which has frequently been described as its resort to substantive due process,⁸³ neither of the two dissenting opinions suggested that the Due Process Clause is or should be concerned only with adjudicative procedures.⁸⁴ Justice Harlan explicitly endorsed substantive due process⁸⁵ but found the Bakeshop Act reasonable.⁸⁶ Justice Holmes counseled legislative deference—what we today would call rational basis review—but his opinion

79. In case it is not clear from the main text, I do not wish to overstate this point. Bowker received his LL.M. degree from the University of Minnesota, *see* Bowker, *supra* note 71, at 281. Levy is a Pulitzer Prize-winning American constitutional historian, *see* LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968), and Meyer became a prominent federal government lawyer, *see* Hegreness, *supra* note 77, at 958–59. Still, whether one's exposure to the domestic legal culture occurs during one's formative professional years or at some other time might plausibly affect one's instincts towards a legal term of art such as due process of law. In particular, judicial review in Canada did not extend to constitutional rights at the time of Bowker's writing, and the Continental civil law tradition rejects the kind of evolutionary jurisprudence that gave birth to substantive due process.

80. *See, e.g.*, BORK, *supra* note 17, at 31.

81. *See* James W. Ely, Jr. *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 315, 318 (1999).

82. *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857). The "substantive due process" holding, which does not use the precise term, is notoriously opaque. *See* DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 382 (1978).

83. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 514–16 (Black, J., dissenting).

84. *See* Corwin, *supra* note 62, at 367; John Paul Stevens, *Learning on the Job*, 74 *FORDHAM L. REV.* 1561, 1561–62 (2006).

85. *Lochner v. New York*, 198 U.S. 45, 68 (Harlan, J., dissenting) ("Granting, then, that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment . . .").

86. *Id.* at 69–73.

nonetheless rests on the view that the Due Process Clause requires judges to inquire into “fundamental principles as they have been understood by the traditions of our people and our law.”⁸⁷ Holmes betrayed no textual or other principled objection to substantive due process: “General propositions do not decide concrete cases.”⁸⁸

There is some evidence that Louis Brandeis, the other great dissenter of the *Lochner* era, believed, as a matter of principle, that the Due Process Clause should be limited to procedural irregularities. Felix Frankfurter noted as much in transcribing a 1923 conversation with Brandeis in which the latter is reported to have said further that, so long as due process is recognized as having a substantive component, it must be applied to those rights that are truly fundamental such as speech and education.⁸⁹ Brandeis’s contingent adoption of substantive due process reflects his position in *Meyer v. Nebraska*⁹⁰ and *Pierce v. Society of Sisters*⁹¹—both education cases in which Brandeis joined the majority’s substantive due process holding—and in *Gilbert v. Minnesota*,⁹² in which he dissented from the Court’s opinion upholding a Minnesota anti-sedition law. After recounting the Court’s series of substantive due process holdings in the economic realm, Brandeis wrote in *Gilbert*, “I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.”⁹³

Justice Brandeis’s reluctant acceptance of substantive due process is also of course reflected in his famous concurring opinion in *Whitney v. California*.⁹⁴ “Despite arguments to the contrary which had seemed to me persuasive,” he wrote, “it is settled that the due process clause of the Fourteenth Amendment

87. *Id.* at 76 (Holmes, J., dissenting).

88. *Id.* Indeed, although Holmes dissented from the Court’s substantive due process holding in *Meyer v. Nebraska*, see *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting), he joined the unanimous opinion in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), without any separate writing. Moreover, his dissenting opinion in *Gitlow v. New York*, 268 U.S. 652 (1925), suggested a (perhaps grudging) commitment to substantive protection of rights via Due Process Clause. See *id.* at 672 (Holmes, J., dissenting).

89. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 320.

90. 262 U.S. 390 (1923).

91. 268 U.S. 510 (1925).

92. 254 U.S. 325 (1920).

93. *Id.* at 343 (1920) (Brandeis, J., dissenting).

94. 274 U.S. 357 (1927).

applies to matters of substantive law as well as to matters of procedure.”⁹⁵ I am not aware of any writings in which Brandeis specified what, precisely, those persuasive arguments comprised. This point is significant in itself. Brandeis’s approach to law was intensely fact-specific, not given to pronouncements of what legal provisions mean in a metaphysical sense. It was appropriate to his life as an advocate that the meaning of the Due Process Clause could be settled through legal argumentation and precedent and not thereafter revisited *ex tabula rasa*. Moreover, as his *Gilbert* dissent reflects, Justice Brandeis’s views on the Due Process Clause are inseparable from his views on the property rights with which the clause had always been associated in its substantive form.

His disciple Frankfurter likewise agreed with Brandeis about the procedural connotations of substantive due process⁹⁶ but likewise seemed motivated less by any philosophical objection than by distaste for the results he observed. Like Brandeis, Frankfurter supported the Court’s decisions in *Meyer* and *Pierce*, but he thought that liberty-protecting decisions such as those could not justify the cost of property-protecting decisions like *Lochner* and *Coppage v. Kansas*.⁹⁷ As a judge, Frankfurter gave no hint of dissent from the proposition that the Due Process Clause forbids certain significant rights deprivations.⁹⁸ He joined several opinions in which the Court overturned (or the joined dissent would have overturned) non-procedural state laws as violations of due process,⁹⁹ concurring in *Sweezy v. New Hampshire*, overturning a state-level subversive activities prosecution, Justice Frankfurter wrote that striking a balance between a citizen’s right to political privacy and the State’s right to self-protection “is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process

95. *Id.* at 373.

96. Urofsky, *supra* note 89, at 320; Frankfurter, *The Red Terror of Judicial Reform*, 40 NEW REPUBLIC 110, 113 (1924) (“The due process clauses ought to go.”).

97. *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating legislation that forbid yellow-dog contracts); see Felix Frankfurter, *Can the Supreme Court Guarantee Toleration?*, unsigned editorial, 43 NEW REPUBLIC 85, 86 (1925), reprinted in LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 195, 196 (1st ed., 1939).

98. See Louis H. Pollak, *Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment*, 67 YALE L.J. 304, 317 (1957).

99. See *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

Clause.”¹⁰⁰ To be sure, Frankfurter, like Holmes, believed deeply in legislative deference.¹⁰¹ But that did not mean the Court should stay altogether out of the business of ensuring that, as Justice Jackson wrote, joined by Frankfurter, “reasonable general legislation [is] reasonably applied to the individual.”¹⁰²

To recap, none of the great opponents of substantive due process prior to the 1960s opposed it on textual grounds. As discussed below, that omission results in part from an intellectual temperament within the constitutional culture that was less literalist and, relatedly, less worshipful of the constitutional text and its authors.¹⁰³

Discussion of substantive due process among constitutional lawyers and commentators grew dramatically in the 1960s and 1970s. Figure 1 reproduces an Ngram of references to “substantive due process” in English-language books digitally catalogued by Google Books from 1920 to 2008.¹⁰⁴ The Ngram illustrates a sharp upward trend with an inflection point at 1965, the year in which the Supreme Court decided *Griswold v. Connecticut*¹⁰⁵ and four years after the Court decided *Griswold*’s predecessor case, *Poe v. Ullman*.¹⁰⁶ *Griswold*, which overturned a Connecticut ban on contraceptive use, drew plenty of fire, including from the dissenting opinions of Justice Black and Justice Stewart. But neither opinion argues that the Due Process Clause applies only to “process.” Justice Black opposed *Griswold* and other substantive due process holdings on the ground that they protected rights that were not explicit in the constitutional text and therefore granted an inappropriate amount of discretion to

100. *Sweezy v. New Hampshire*, 354 U.S. 234, 267 (1957) (Frankfurter, J., concurring in the result).

101. See Pollak, *supra* note 98.

102. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 222 (1953).

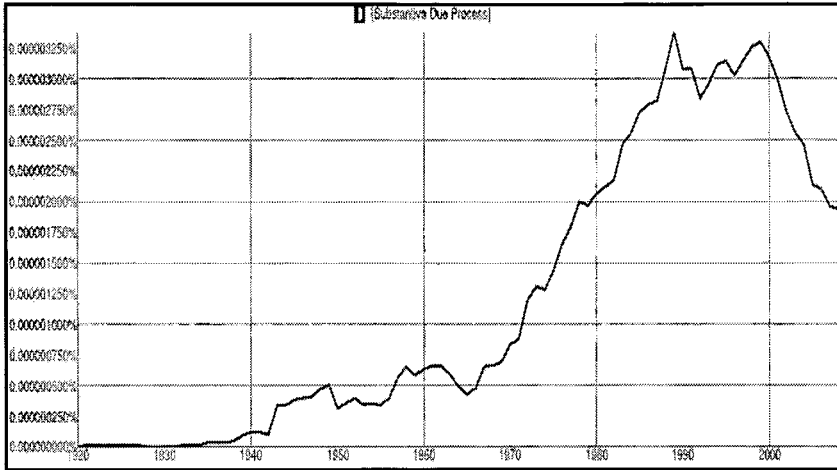
103. See Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. 335 (2015).

104. Google books Ngram Viewer, https://books.google.com/ngrams/graph?content=substantive+due+process&year_start=1920&year_end=2008&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Csubstantive%20due%20process%3B%2Cc0 (search run Aug. 9, 2015). The table has a smoothing of 3, which means that each year represents an average of that year’s value and the values of the three years before and after. Also, the values are reported as a percentage of the complete catalog for any given year, which makes it unlikely that the trend is driven by changes in the denominator rather than the numerator. It is difficult to say this with certainty, however, since we do not know how the proportion of books in the dataset relating to constitutional law varies over time.

105. 381 U.S. 479 (1965).

106. 367 U.S. 497 (1961).

Figure 1



judges.¹⁰⁷ Justice Stewart joined Justice Black’s opinion and opposed the decision on similar democratic process grounds.¹⁰⁸

The structure of Justice Douglas’s majority opinion likely influenced the locus of criticism. Justice Douglas did not follow *Lochner* in arguing that the Due Process Clause, of its own force, authorizes judges to inquire into the substantive reasonableness of state laws. Rather, he argued that the Connecticut anti-contraceptive law touched on interests implicated in a constitutional right to privacy that, as a positive matter, could be located within the interstices of the text of the Bill of Rights.¹⁰⁹ This approach proved an easy target. Representing the right to privacy as a “penumbra” or “emanation” from the Constitution seemed a reach to many, one that exposed a deficit in serious arguments in favor of such rights. Grounding the interests Douglas sought to protect more directly in the Due Process Clause—as the opinions of Justice Goldberg,¹¹⁰ Justice Harlan,¹¹¹

107. See *Griswold*, 381 U.S. at 510–21 (Black, J., dissenting). Justice Black’s belief in total incorporation, see *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting), would have made it incongruous for him to criticize *Griswold* as an unduly substantive use of the Due Process Clause.

108. See 381 U.S. at 527–31 (Stewart, J., dissenting).

109. See *id.* at 481–84.

110. *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring).

111. *Lochner v. New York*, 198 U.S. 45, 65 (Harlan, J., concurring).

and Justice White¹¹² all sought to do in different ways — was more open to criticism based on *Lochnerism* but was, by comparison, a more textualist approach.

Consistent with that observation, the dominant criticisms of substantive due process in the decade following *Griswold* tended to be prudential rather than textual. Thus, Alexander Bickel and Philip Kurland rejected a constitutional right to privacy or otherwise objected to *Griswold* or *Roe* on the merits.¹¹³ Both believed in incorporation via the Due Process Clause. Neither appeared to view the text as compelling a procedural focus. Justice Rehnquist's dissent in *Roe* also did not object to substantive due process *tout court*.¹¹⁴ Indeed, he argued that an abortion restriction without an exception for procedures thought necessary to save the pregnant woman's life would violate the Due Process Clause.¹¹⁵ Even Robert Bork lodged no textual objection to the word "process." Bork believed that any constitutional rights not specifically enumerated in the text requires judges to make impermissible value judgments, and so substantive due process was an invitation to activism rather than (necessarily) a perversion of the text.¹¹⁶ Indeed, Bork would sacrifice the text to judicial restraint.

Textual arguments against the Due Process Clause gained currency in the 1980s, following Ely's book. Since then, literally hundreds of authors, including several judges in the course of opinions, have called substantive due process oxymoronic or contradictory, and a fair number have cited Ely for that proposition.¹¹⁷ Notably, the first state or federal judge to have

112. *Moore v. City of E. Cleveland*, 431 U.S. 494, 541 (1977) (White, J., dissenting).

113. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 27–28 (1977); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 161 (1973).

114. See *Roe v. Wade*, 410 U.S. 113, 172–73 (Rehnquist, J., dissenting). Justice White, who also dissented in *Roe*, was not opposed to substantive due process. See *Griswold*, 381 U.S. at 502 (White, J., concurring in the judgment).

115. See *Roe*, 410 U.S. at 173.

116. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971). Bork accepted incorporation via the Due Process Clause.

117. Court decisions include, among others: *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment); *Stemler v. City of Florence*, 126 F.3d 856, 866 n.10 (6th Cir. 1997) (Boggs); *McKinney v. Pate*, 985 F.2d 1502, 1509 (11th Cir. 1993) (Fay), *opinion vacated*, 994 F.2d 772 (11th Cir. 1993); *Saukstelis v. City of Chicago*, 932 F.2d 1171, 1173 (7th Cir. 1991) (Easterbrook); *Braley v. Pontiac*, 906 F.2d 220, 228 (6th Cir. 1990) (Nelson, J., concurring); *Blaska v. Fuentes*, 836 F.2d 1347, at *13 (6th Cir. 1988) (Nelson); *Brower v. City of Inyo*, 817 F.2d 540, 544 n.4 (9th Cir. 1987) (Goodwin); *United*

called substantive due process an oxymoron in a published opinion appears to have been Posner, who did so in a 1982 case in which (apparently without irony) he called the doctrine simultaneously “exotic” and “ubiquitous.”¹¹⁸ Judge Posner has referred to the phrase as oxymoronic several times since.¹¹⁹

This trend surely says less about substantive due process, which meant about the same (if not less, substantively) in the 1980s as it did before, than it says about prevailing practices of constitutional argumentation. The more or less sudden realization that “substantive” contradicts “process” in the Due Process Clause—and that this is a fatal defect—coincides with the rise of a certain kind of originalism. That rise was not organic but rather was deliberately orchestrated by conservative activists both inside and outside of the Reagan Justice Department.¹²⁰ Indeed, a substantial number of the judicial opinions to have made textual criticisms of substantive due process—and the great majority of the appellate opinions—were written by appointees of that department.¹²¹ Two of those appellate judges, Danny Boggs of the Sixth Circuit and Frank Easterbrook of the Seventh Circuit, worked under Bork in the Office of the Solicitor General in the 1970s.

Originalism does not, per se, support the view that substantive due process is contradictory. As noted, whether the framers of the Fifth or Fourteenth Amendments meant to endow

States Jaycees v. McClure, 709 F.2d 1560, 1568 (8th Cir. 1983) (Arnold); Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982) (Posner); Tobias v. Pletzke, 933 F. Supp. 2d 892, 917 n.18 (E.D. Mich. 2013) (Ludington); Wolverine Fireworks Display v. Towne, No. 12-10426, 2012 U.S. Dist. LEXIS 79229, *42 n.1 (E.D. Mich. 2013) (Ludington); Estep v. City of Somerset, No. 10-826-ART, 2010 U.S. Dist. LEXIS 135189, *16 (E.D. Ky. 2010) (Thapar); Cramer v. Chiles, 33 F. Supp. 2d 1342, 1352 n.4 (S.D. Fla. 1999) (Ferguson, Jr., J.); Swales v. Twp. of Ravenna, 989 F. Supp. 925, 934 n.2 (N.D. Ohio 1997) (Bell); Jones v. Doria, 767 F. Supp. 1432, 1437 (N.D. Ill. 1991); *Ex parte* Anonymous, 803 So. 2d 542, 550 (Ala. 2001) (Moore, C.J., concurring specially).

118. *Ellis*, 669 F.2d at 512.

119. See *Torregrossa v. Bd. of Trs.*, No. 98-374, 1999 U.S. App. LEXIS 7383 (7th Cir. 1999) (per curiam); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989); *Ill. Psychological Ass’n. v. Falk*, 818 F.2d 1337, 1342 (7th Cir. 1987); *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985); *Bigby v. City of Chicago*, 766 F.2d 1053, 1058 (7th Cir. 1985).

120. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 154–55, 158–59 (2004); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006).

121. Those appointees include Boggs, Frank Easterbrook, David Nelson, Posner, and Scalia. Bork was also of course a D.C. Circuit appointee of President Reagan.

the Due Process Clause with substantive content is a contested question, and the phrase “due process of law” has long been thought synonymous with “according to the law of the land,” which is not inherently procedural. The 1980s turn against the words instead reflects a particularly literal, acontextual, and politically opportunistic (if sincere) approach to historical argument: in the spirit of oxymorons, call it anachronistic originalism.

Words in legal documents are not just their counterparts in ordinary speech. They are meant to be understood by their handlers—lawyers, usually—who operate under certain professional assumptions that may diverge from common speech conventions. This is not to say that legal documents, and especially constitutions, are not meant to be understood by non-lawyers; it is to say, rather, that even constitutions are not meant to be misunderstood by lawyers. It is telling that Justice Black, perhaps the most committed textualist in the Court’s history, did not believe the text of the Due Process Clause had a facially obvious meaning: “Some might think that the words themselves are vague,” he wrote in his dissenting opinion in *In re Winship*,¹²² “[b]ut any possible ambiguity disappears when the phrase is viewed in the light of history and the accepted meaning of those words prior to and at the time our Constitution was written.”¹²³ The belief that “substantive” and “process” are necessarily, indeed risibly, in conflict transposes a modern, common-sense view of the meaning of English words onto words in eighteenth and nineteenth-century legal documents.

For a non-originalist and a pragmatist like Posner,¹²⁴ there is nothing untoward about this move. He does not, after all, reject substantive due process; he just thinks it sounds silly, and he’s right. For others, conflating the common sense meaning of today with the legal meaning of yesterday can go some way towards affecting the legal meaning of today. “It is not that ‘substantive’ due process is linguistically self-contradictory,” Henry Monaghan wrote in 1981. “It is not any longer, if one accepts the teachings of

122. 397 U.S. 358 (1970).

123. *Id.* at 378 (Black, J., dissenting). Justice Black is referring to the words of the Fifth Amendment, though the case concerned the words of the Fourteenth. The casual conflation of these clauses is perplexing for a textualist-originalist. See Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978 (2012).

124. See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

ordinary language philosophy that ‘meaning is use.’ The core problem is one of constitutional theory, not of language.”¹²⁵ But adopting and promoting a constitutional theory that relies on language means that changing language meaning—as through “use”—serves one’s theory. Through sufficient repetition within the appropriate language community, the view that substantive due process is an oxymoron can become a self-fulfilling prophesy. If it was not an oxymoron in 1981, it is now—or so that was the goal.

But there is more to it than this. Although the phrase substantive due process has been around for nearly a century, the category of claims it describes was more often simply called “due process” for much of that time. As substantive due process became more frequently invoked as a distinct constitutional claim, procedural due process—which seems redundant—also was invoked more often. Using two different words for something—making it *some things*—has cognitive in addition to linguistic consequences. Experiments in linguistics have demonstrated that the categories that exist within a particular language community influence participants’ perception of phenomena in the world. For example, native Spanish speakers tend strongly to associate objects with the genders grammatically assigned to them within the Spanish language, even if those assignments are arbitrary.¹²⁶ Thus, consistent with patterns across languages, a native English speaker is likely to code natural objects as feminine and artificial objects as masculine; for Spanish speakers, this tendency is often overridden by the grammatical categories of Spanish.¹²⁷

A soft form of linguistic relativity seems likely to influence judgments made within the language community of constitutional lawyers. Substantive due process peels away from procedural due process not just because of any underlying conceptual or semantic difference but also because they carry different labels. And as between these labels, procedural due process surely seems more “about” “process,” and therefore to have more conceptual

125. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 373–74 (1981).

126. See Maria D. Sera, et al., *Grammatical and Conceptual Forces in the Attribution of Gender by English and Spanish Speakers*, 9 COGNITIVE DEVELOPMENT 261 (1994).

127. See *id.*

integrity. Thus, the phrase “substantive due process” helps to generate the very textual anomaly that it is said to describe.

III

Substantive due process may not be a contradiction in terms, but it sounds like one. Comparing it to green pastel redness is funny, if a bit esoteric. Three of the most significant American legal figures of the last half century, representing wildly different jurisprudential and political ideologies—Ely, Posner, and Scalia—have called substantive due process an oxymoron in prominent writings. Is that enough to make it one? Should it be enough?

A comparative example helps to sharpen the question. Discussions of linguistic relativity migrated into the culture long ago in the form of the old saw that there are x number of “Eskimo” words for snow. The observation is meant to show that language and perception are deeply interrelated. Linguist Laura Martin has described the observation itself, however, as a kind of folklore.¹²⁸ It seems first to have originated in a 1911 article by the anthropologist Franz Boas, who mentioned four different Eskimo words for “snow” in an article about the difficulty in comparing language structures.¹²⁹ Benjamin Whorf, a linguist, later popularized the example, mentioning five words for “snow,” though without naming any specific sources or data.¹³⁰ Two important 1950s anthropological textbooks whose authors were influenced by Whorf mention the example. Martin says that one or both of those books “were probably read by most anthropologists trained between 1960 and 1970, and by countless other students as well during that heyday of anthropology’s popularity.”¹³¹ By 1986, Martin was able to say that “[t]extbook references to the example have reached such proliferation that no complete inventory seems possible,”¹³² and that the example had

128. See Laura Martin, “Eskimo Words for Snow”: A Case Study in the Genesis and Decay of an Anthropological Example, 88 AMER. ANTHROP. 418 (1986).

129. *Id.* at 418 (citing Franz Boas, *Introduction*, THE HANDBOOK OF NORTH AMERICAN INDIANS 40 (1911)).

130. *Id.* (citing Benjamin Lee Whorf, *Science and Linguistics*, 42 TECH. REV. 229–31, 247–48 (1940)).

131. *Id.* (citing EDWARD T. HALL, THE SILENT LANGUAGE 107–08, 110 (1959), and ROGER BROWN, WORDS AND THINGS (1958)).

132. *Id.* at 420.

deeply infiltrated pop culture: it appeared in a Lanford Wilson play,¹³³ a trivia encyclopedia,¹³⁴ a *New York Times* editorial,¹³⁵ and on a local weather forecast. By the time it reached this last source, Boas's four words had become "two hundred."¹³⁶

The "Eskimo words for snow" tale is a meme, "an idea that becomes commonly shared through social transmission."¹³⁷ There is disagreement within the memetics literature as to what more one can say about memes and the degree to which they possess the properties of evolving organisms or map onto existing social scientific understandings of diffusion of practices, beliefs, and other cultural artifacts.¹³⁸ A technical definition is unnecessary to the basic, suggestive insight. The motivating ideas behind memes are that they are social—reproduction through human networks is an existential condition—and that they tend to replicate through imitation or absorption rather than through reflection.¹³⁹ The jurisprudentially inclined will recognize this feature of meme transmission as "content-independence," a quality that also attaches to the authority of common law judicial precedents.¹⁴⁰

Memes are ubiquitous in American constitutional law. Indeed, the common law system encourages the transmission of legal information through shared understandings replicated by processes of imitation that risk mutating the original source.¹⁴¹

133. *Id.* (citing *The Fifth of July* (1978)).

134. *Id.* (citing *THE STRAIGHT DOPE: A COMPENDIUM OF HUMAN KNOWLEDGE* (1984)).

135. *Id.* (referring to Editorial, *There's Snow Synonym*, N.Y. TIMES, Feb. 9, 1984).

136. *Id.* at 420.

137. Robert Aunger, *Introduction*, in *DARWINIZING CULTURE 2* (Robert Aunger ed., 2000).

138. Compare DAWKINS, *supra* note 10, at 206 (describing memes in terms of mental activity), with William L. Benz, *Culture as an Evolutionary Arena*, 19 J. SOC. & EVOLUTIONARY SYSTEMS 321, 323 (1996) (describing memes in strictly phenotypical terms).

139. See DAWKINS, *supra* note 10, at 206; SUSAN BLACKMORE, *THE MEME MACHINE* (1994); see also Henry Plotkin, *Culture and Psychological Mechanisms*, in *DARWINIZING CULTURE*, *supra* note 137, at 69, 78–79 (distinguishing "surface-level" and "deep-level" memes based on the complexity of the acquired and transmitted knowledge); cf. J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 43 (1998) ("Memes encompass all the forms of cultural know-how that can be passed to others through the various forms of imitation and communication.").

140. See FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 62 (2009); H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* 243, 261 (1982).

141. See Michael S. Fried, *The Evolution of Legal Concepts: A Memetic Perspective*, 39 JURIMETRICS 291, 292, 303–04 (1999).

That imitation may be simple, as in a typical string cite, or it may be complex, as in the practice of referring to anticanonical cases to express methodological or substantive disagreement with an interlocutor. For example, citations to *Lochner* or to *Dred Scott* are not precedent-based in the usual sense but are better characterized as forms of ethical argument.¹⁴² Ethical argument draws upon the American self-conception as a source of interpretive authority.¹⁴³ Invocation of anticanonical cases is intended as a conversation-stopper, and the capacity of these cases to serve this function endows them with value beyond whatever underlying analogical power they may contribute.

Much of what goes under the heading of blackletter constitutional law also has a memetic character. Owing to its complex relationship to politics and the magnitude of the (often capricious) Supreme Court's role within it, constitutional law has a contingent character that resists hornbook formulations. For example, it is common teaching that legislative abridgements of fundamental rights are reviewed under strict scrutiny, and yet it is remarkably difficult to find cases in which the Court has applied that standard. This is because, consistent with the thrust of this Essay, the Court in practice grades the reviewing standard by the gravity of the abridgement even as it rarely acknowledges a general practice of doing so.¹⁴⁴ Karl Llewelyn long ago recognized interpretive canons as having a similarly memetic structure: "to make any canon take hold in a particular instance, the canon must be sold, essentially, by means other than the use of the canon."¹⁴⁵ Canons are rhetorical resources, and Llewelyn's memorable observation that each canon-based claim confronts an equally canonical counterclaim means to demonstrate, whimsically, that their proliferation is content-independent.¹⁴⁶

Richard Primus has identified a related phenomenon as a "continuity tender," which he defines as "an inherited ritual formula that one repeats to affirm a connection to one's predecessors, not to endorse the content of that statement as

142. See Greene, *supra* note 9, at 463.

143. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 94 (1982).

144. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

145. Karl N. Llewelyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

146. See *id.* at 401–06.

one's predecessors originally understood it."¹⁴⁷ For Primus, a continuity tender is a kind of rote incantation that serves a symbolic link to the past, on the order of Royal Assent to statutes passed by the British parliament.¹⁴⁸ "Be it enacted by the Queen's Most Excellent Majesty" serves the same community-building purpose that other rituals serve, but it has no practical significance.¹⁴⁹ Primus's motivating U.S. constitutional example is the notion that the federal government is a government of enumerated powers. Courts recite this principle in constitutional cases in order to emphasize a core ethical commitment of American constitutionalism,¹⁵⁰ but in practice Congress has come to have a general police power.¹⁵¹

All continuity tenders are memes but not all memes are continuity tenders. Repetition of a constitutional meme need not serve the purpose of symbolic continuity with the past. It might alternatively serve as a kind of cognitive shortcut, or heuristic.¹⁵² Constitutional decision-making can be difficult. The resources for resolving such cases—typically identified as text, history, structure, precedent, and consequences—can be mutually inconsistent, and there is no consensus on how (or whether) to assign weights among them.¹⁵³ Cognitive heuristics can place the interpreter into a frame of mind that streamlines decision-making, and particular memes can be vehicles for these heuristics.

Consider two heuristics that are pervasive within legal argument: the *affect* and *expertise* heuristics. The affect heuristic involves reliance on whether a potential risk is emotionally coded

147. Richard Primus, *Why Enumeration Matters* 8 (March 25, 2015), MICH. L. REV., forthcoming 2016, <http://ssrn.com/abstract=2471924>.

148. *See id.*

149. *See id.* at 8–9.

150. *See* BOBBITT, *supra* note 143 at 20 (1991).

151. *See* Primus, *supra* note 147, at 14.

152. *See* Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974); *see also* BALKIN, *supra* note 139, at 58–59 (describing the role of certain memes that act as "cognitive filters"); *cf.* Frederic M. Bloom, *Information Lost and Found*, 100 CAL. L. REV. 635, 676 (2012) ("[I]nformation seekers expend as little effort as they can. Given a choice between low-value-but-easily-accessible information and high-value-but-harder-to-find substitutes, people pick low value time and again.").

153. *See* BOBBITT, *supra* note 143 at 122–25 (1993); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988). *But see* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Argumentation*, 100 HARV. L. REV. 1187 (1987).

as “good” or “bad.”¹⁵⁴ This heuristic is critical to System 1, or experiential, thinking, which “encodes reality in images, metaphors, and narratives to which affective feelings have become attached.”¹⁵⁵ The expertise heuristic involves reliance on expert validation as a quick-and-ready measure of the accuracy of a particular judgment.¹⁵⁶ Legal arguments, including those offered by constitutional judges, make frequent use both of appeals to emotion (including through humor) and of appeals to authority.¹⁵⁷ Appeals of those sorts align constitutional argument with other modes of practical discourse, as they correspond, respectively, with the pathetic and ethical modes of persuasion first identified by Aristotle.¹⁵⁸

The association of the substantive-due-process-as-oxymoron meme with a joke by Ely, and subsequently with the views of other leading figures in constitutional law, enables legal audiences—including judges, lawyers, and non-lawyers—to process its underlying content using heuristics. This is not to say that the presence of the meme disables systematic processing—both systematic and heuristic processing can occur in relation to the same proposition—nor is it to say that commentators must be wrong that substantive due process is an oxymoron. One could disagree with the analysis in Part I and it would still be the case that the ways in which the substantive-due-process-as-oxymoron meme is typically communicated make its truth or falsity less relevant to its capacity to persuade. As Michael Fried writes, “Mememes, like genes, will succeed if they are good replicators, whether or not they are correct or good for their human carriers.”¹⁵⁹

There is reason, though, for constitutional lawyers to be less bothered by this possibility than linguists are bothered by

154. Paul Slovic & Ellen Peters, *Risk Perception and Affect*, 15 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 322, 322 (2006).

155. *Id.* at 323; see DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011) (describing the differences between System 1 and System 2 thinking); Shelly Chaiken et al., *Heuristic and Systematic Processing Within and Beyond the Persuasion Context*, in UNINTENDED THOUGHT 212, 212–213 (James S. Uleman & John A. Bargh eds., 1989) (contrasting “heuristic” versus “systematic” processing).

156. See Chaiken et al., *supra* note 155, at 216.

157. See Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013).

158. See *id.*; ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE (GEORGE A. KENNEDY TRANS., OXFORD UNIV. PRESS 1991).

159. Fried, *supra* note 141, at 298.

apocryphal claims about Eskimo words. Martin's article on the words-for-snow meme provoked a vigorous scholarly debate over the accuracy of the underlying proposition.¹⁶⁰ Whether the different descriptors for snow in various dialects of Eskimo and Inuit languages are really compound words atop a small and uninteresting set of roots or whether the dozens of words for snow and snow-related phenomena are each lexically distinct and worthy of study is of great importance to linguists and anthropologists who focus on indigenous languages.¹⁶¹ Notably for our purposes, the fact that local weathermen appear to believe that there are 200 Eskimo words for snow (within a given dialect, the laugh line assumes) is of no moment to the serious debate among language professionals. They are simply different discourses, between which any influence, such as it may be, is unidirectional, from the Benjamin Whorfs of the world down to the Brick Tamlands.

Constitutional law obeys a different epistemology. It is primarily the product of a "constitutional culture" of non-judicial actors whose values and beliefs it incorporates.¹⁶² This observation is nearly axiomatic among political scientists, and it is broadly shared by constitutional lawyers as well.¹⁶³ Constitutional law takes its cues from—sits in dialogue with—legal understandings embedded within the broader culture, and relies on that culture for validation. Standard accounts of court decision-making understand certain prudential mechanisms from the perspective of the need for the law, as Neil Siegel writes, to "account for the conditions of its own legitimation."¹⁶⁴ As Robert

160. See Igor Krupnik & Ludger Müller-Wille, *Franz Boas and Inuktitut Terminology for Ice and Snow: From the Emergence of the Field to the "Great Eskimo Vocabulary Hoax"*, in SIKU: KNOWING OUR ICE 377, 390–91 (2010).

161. See *id.*

162. See Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 10 (2003).

163. See H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 6 (2002) (defending a vision of "constitutional law as a servant of American political life rather than its master"). Those who deny the dynamic and culturally dependent nature of constitutional law are often the ones most likely to describe substantive due process as an oxymoron, thereby demonstrating, again, that modern forms of originalism are sustained by epistemological resources that only living constitutionalism can supply. See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009); Post & Siegel, *supra* note 120.

164. Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 963 (2008); see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

Post notes, “the Court must find a way to articulate constitutional law that the nation can accept as its own.”¹⁶⁵

The upshot of this perspective is that, in constitutional law, persuasion carries independent normative weight. The value of persuasion in constitutional law is not merely instrumental or practical, as it is in other domains, but is also semantic. Constitutional law that fails to evolve with and seek affirmation from the people it governs not only fails descriptively, when it comes to the U.S. Constitution, but is also tyrannical.¹⁶⁶ And so it counts against a constitutional proposition that the proposition is not persuasive.¹⁶⁷ To the extent there is tension between what is persuasive and what is “correct,” it may not always be normatively appropriate for a constitutional decision-maker to be guided by the latter. Validation from the constitutional community is a lot (if not all) of what matters to the legitimacy of constitutional law. That validation happens iteratively, as judicial actors seek both to “reflect and regulate constitutional culture,”¹⁶⁸ but its indefinite absence is the death of a constitutional claim.

Which returns us to the question with which this Part began: how much should we be bothered that actors throughout the constitutional culture believe that substantive due process is an oxymoron if the belief lacks logical foundation? The answer to this question depends on who the actors are. Academics should of course interrogate the conventional wisdom of their subjects, and so constitutional law scholars and teachers should either adopt or explicitly reject a critique along the lines of Part I. Most legal advocates arguing either in favor of or against a substantive due process claim should assume whatever posture is most helpful to their overall legal position. The underlying analytic integrity of that position is not independently relevant, though certain repeat players such as the Solicitor General may moderate their

165. Post, *supra* note 162, at 11.

166. See JAMES BOYD WHITE, JUSTICE AS TRANSLATION 217 (1990) (referring to a good judge’s recognition that “their authority must be created rhetorically, in the opinion itself; that it depends upon the informed understanding of the reader and upon his acquiescence, not in the ‘result’ or even the ‘reasoning’ by which the result is reached, but in the set of relations and activities created in the opinion”).

167. See Greene, *supra* note 157, at 1454; see also AMARTYA SEN, THE IDEA OF JUSTICE 394 (2009) (“[I]f others cannot, with the best of efforts, see that a judgment is, in some understandable and reasonable sense, just, then not only is its implementability adversely affected, but even its soundness would be deeply problematic.”).

168. Post, *supra* note 162, at 10.

advocacy in the immediate case for reputational or institutional reasons. Although the role morality of lawyers is not without complexity,¹⁶⁹ it is clear that legal advocates need not subjectively believe in the arguments they advance on clients' behalf.¹⁷⁰

The more difficult question is whether different obligations attach to judges or other constitutional decision-makers. The possibility that memes distort the analytic integrity of constitutional law surfaces at least two potential problems for adjudicators, whom we will call judges for expository purposes. First, judges might be persuaded to make decisions that they would not make had they the time and inclination to interrogate the meme. Second, judges might themselves make use of memes to persuade their audiences to adopt the judges' ultimate conclusions.

The first problem implicates the integrity of constitutional decision-making and the second the integrity of constitutional acceptance. Using a constitutional meme to persuade a judge as to a legal proposition is good lawyering. It is not clear why we should think about its effects differently than using any other rhetorical tools to persuade a judge as to the wisdom of one's underlying case. The risk that a judge is duped by clever lawyers is one the American adversarial model is committed to tolerating.¹⁷¹

The second problem is less familiar. Could a Supreme Court Justice agree with every jot and tittle of Part I of this Essay and still take as given and write constitutional opinions under the assumption that substantive due process is a contradiction in terms?

On one hand, judges act analogously all the time. *Primus's* continuity tenders demonstrate that judicial decision-makers often write things in opinions that they know not to be correct in a narrow sense. Charles Black memorably defended Justice Black's insistence on First Amendment absolutism on the ground (never publicly espoused by the Justice)¹⁷² that this is the right "attitude" to take towards the Bill of Rights even as one fully

169. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

170. See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* (2008).

171. See generally JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 80–102 (1949).

172. Cf. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 180–81 (1981) (suggesting that Justice Black acknowledged his dissembling obliquely in private).

appreciates the logical necessity of balancing.¹⁷³ Bickel, of course, was the most famous proponent of the Court's disingenuous invocation of procedural barriers to substantive review—in the name of principle, no less!¹⁷⁴ Constitutional adjudicators must respect other values in addition to and potentially in tension with the analytic integrity of particular propositions of constitutional law. Common law constitutionalism indeed presupposes that constitutional truth is constructed out of materials whose value flows from features, such as antiquity or reliance,¹⁷⁵ that are orthogonal to their “correctness.” One of those features is and should be the power to persuade.

On the other hand, that concession seems to condone judicial dishonesty. Normally lying is a moral bad,¹⁷⁶ and it would be surprising if judges were held to lower standards than others in this domain. Indeed, in his blunt assessment of lawyering work as essentially involving lying and cheating, Daniel Markovits holds out the judicial function as commendably distinct.¹⁷⁷ David Shapiro has urged that judicial candor is inherent in the obligation, crucial to the legitimacy of judging, to give reasons: “In a sense, candor is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another.”¹⁷⁸ Micah Schwartzman writes that an adjudicator who brings the violence of the state to bear upon a real-world dispute owes a moral duty to the litigants to give an honest assessment of his or her reasons for action.¹⁷⁹

Scholars who defend judicial dishonesty sometimes argue that the rule of law requires decisions reached on policy or intuitive grounds nonetheless to be articulated through legal

173. Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 1961, at 63, 66.

174. See BICKEL, *supra* note 164, at 69; Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

175. See LON FULLER, *THE LAW IN QUEST OF ITSELF* 13 (1940).

176. See generally SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978).

177. MARKOVITS, *supra* note 170, at 3–4, 14–15.

178. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

179. See Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990 (2008).

technicalities.¹⁸⁰ The apparent reliance on technicalities gives a judicial opinion the appearance of law and can conceal political motivations. But at other times such references can have a nearly opposite effect, suggesting a lack of judicial empathy or an inability to appreciate the stakes of a decision. The occasional imperative for the Supreme Court especially to communicate in non-technical language might be one of the legacies of *Brown v. Board of Education*.¹⁸¹ *Brown*'s outsized significance surely results in part from an appeal to constitutional common sense, validated over time, as a strategy for defeating legalistic but myopic arguments based on text, history, and precedent.¹⁸²

Any tension between the technical accuracy of a constitutional opinion and its public intelligibility undermines the case that judicial candor advances public understanding. The degree of identity between judicial and public understanding is an empirical question, and it seems obvious that perfect identity is not the answer. That fact, if true, is not quite fatal for someone like Schwartzman, who adopts a deontological stance towards the obligation of judicial sincerity.¹⁸³ Note, though, that constitutional law at the Supreme Court level is self-consciously not deontological in respect to the litigants. The Court's standards for certiorari disclaim any interest in "error-correction," instead searching for cases that may be used as "vehicles" to announce broader rules, standards, and principles for the benefit of society more generally.¹⁸⁴ The Court, in other words, understands its job to treat litigants as means rather than as ends in themselves.¹⁸⁵

180. See Martin Shapiro, *Judges as Liars*, 17 HARV. J. L. & PUB. POL'Y 155 (1994); GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

181. 347 U.S. 483 (1954).

182. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960) ("Simplicity is out of fashion, and the basic scheme of reasoning on which these cases can be justified is awkwardly simple."); see generally JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND* (1992).

183. See Schwartzman, *supra* note 179, at 990.

184. See SUP. CT. REV. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 234 (1991) ("Another commonly agreed upon criterion that renders a case unworthy is if it is a 'bad vehicle' or has 'bad facts.'").

185. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 41 (Mary Gregor trans., 1997) (1785). Something of the Court's distinctive role in announcing broader societal commitments lies behind Guido Calabresi's view that "[t]he Supreme

I want to suggest that judicial rhetoric in constitutional cases should best be understood as emerging from an act of *translation*. Producing a judicial opinion involves multiple decision nodes. A judge reaches a legal conclusion through some mental process, the particulars of which are (it is important to say) irrelevant for our purposes. Communicating that decision to an audience of colleagues, litigants, lawyers, and the public involves a new set of choices. If the decision was reached by intuition (and in the unlikely event the judge is aware that it was),¹⁸⁶ the judge must decide whether to reveal that fact or instead to write an opinion that uses the tools of law to validate the hunch. If the judge reached the decision through the very application of such tools (that is, if the judge perceives herself to have done so), the judge still must decide whether and how to use those tools in writing the opinion. Persuasion makes powerful demands at this stage, and a conscientious judge should be aware that what persuades him or her might not persuade others. The judge must communicate his or her ideas in a distinctive register—the language, if you will, of constitutional rhetoric.

Interpretive discourse has seen translation metaphors before, and it is important to distinguish other uses.¹⁸⁷ Lawrence Lessig has argued that fidelity to the Constitution requires a form of translation, a sensitivity both to an unchanging text and a changing context that can legitimate interpretive outcomes that differ from what originalism might superficially seem to require.¹⁸⁸ Lessig's insight is to more fully appreciate time as a dimension of difference in textual meaning. Lessig's claim is consistent with the notion that constitutional language such as "due process of law" lacks the stability to make much sense of treating substantive due process as an inherent contradiction in terms. But like most constitutional theorists who have referenced translation, Lessig is concerned with the meanings a decision-maker attaches to a text he or she is charged with interpreting. My concern, instead, is with

Court must occasionally lie; the courts by and large should not." CALABRESI, *supra* note 172, at 179.

186. See, e.g., Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977) (examining our inability to discern the reasons behind our thoughts and actions).

187. For a fairly comprehensive bibliography, see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171 n.32 (1993).

188. See *id.*

the way in which the decision-maker communicates that interpretive decision to his or her audience.

James Boyd White's usage is closer to mine, though his project has a different normative center. For White, the metaphor of translation captures the idea that someone who writes a legal opinion performs a creative act that does not (because it cannot) simply reproduce the original text but rather is faithful both to it and to the reader of the translation; it is "a way of establishing relations by reciprocal gesture."¹⁸⁹ A translation "will be judged by its coherence, by the kinds of fidelity it establishes with the original, and by the ethical and cultural meaning it performs as a gesture of its own."¹⁹⁰ Like a good translation, the lawgiver should be humble about his or her capacity for complete exposition and should understand the ways in which the reader's understandings bind the law's public expression (and therefore the law itself).¹⁹¹

A constitutional meme is a conventional form of public expression of constitutional law. It is not a legal fiction because its falsity is not generally acknowledged or even realized, either by author or by reader.¹⁹² But the metaphor of translation helps us to understand why a constitutional meme is not, then, a lie—even if its falsity is known by the author alone.¹⁹³ As an undergraduate I took a course whose professor was a native French speaker. This professor had a habit of referring to a prospective meeting with a student as a *rendezvous*. Among French speakers, this usage is entirely unremarkable, as the word is best translated into English as "meeting."¹⁹⁴ Among American students, it was embarrassingly off-key, since in American culture the word commonly connotes a meeting for the specific purpose of a *liaison*. When this alternative meaning was (gingerly) brought to the professor's attention, he began to say "meeting," even though *rendezvous* came more naturally to his mind. We would never say the

189. WHITE, *supra* note 166, at 256.

190. *Id.*

191. *See id.* at 258.

192. *See* Fuller, *supra* note 34, at 368 ("A fiction is generally distinguished from an erroneous conclusion . . . by the fact that it is adopted by its author with knowledge of its falsity.").

193. *Cf.* Shapiro, *supra* note 178, at 733 (suggesting overstatement in the claim that "everyone understands a certain amount of dissembling to be part of the adjudication game").

194. *See* AMERICAN HERITAGE DICTIONARY 1046 (2d coll. ed. 1991) (defining "rendezvous" as "[a] prearranged meeting").

professor was lying or even that he was being less than candid, even though he was not speaking his mind and even though the word he initially used “technically” meant exactly what he intended to convey. We would say instead that he was translating.

Now consider a judge who disagrees with the Court’s decision in *Obergefell*. It does not matter for our purposes what grounds this disagreement, whether a view that there is not sufficient consensus for the Court to mandate marriage equality through the Constitution,¹⁹⁵ that the generation that ratified the Fourteenth Amendment did not understand it to extend to regulation of marriage in this way,¹⁹⁶ that extending marriage to same-sex couples threatens religious liberty,¹⁹⁷ or that same-sex relationships are immoral or may validly be treated as such by the state.¹⁹⁸ Should this hypothetical dissenting judge’s further argument that substantive due process “distorts the constitutional text”¹⁹⁹ depend on whether he or she agrees that it is a textual contradiction? I think not, just as advancing the argument that the *Obergefell* Court has repeated the errors of *Dred Scott*²⁰⁰ should not depend on whether the judge believes *Dred Scott* was erroneous. If it has become a conventional view of the law-consuming public (including members of the legal profession and other professional elites who form the core of the judge’s audience) that substantive due process is a textual distortion and that *Dred Scott* was wrong, then those propositions are part of our constitutional law and are therefore resources for use in constitutional argument. The judge who avails herself of those resources in the course of adjudicative exposition engages in an act of translation.

195. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–12 (2015) (Roberts, C.J., dissenting).

196. See *id.* at 2628 (Scalia, J., dissenting).

197. See *id.* at 2642–43 (Alito, J., dissenting).

198. See *Ex parte State ex rel. Ala. Policy Inst.*, 1140460, 2015 Ala. LEXIS 33, 138 (Ala., Mar. 5, 2015) (per curiam) (“It seems at least disingenuous to find a constitutional infirmity with traditional marriage laws by way of a moral judgment when states have been forced to defend those laws apart from any moral or religious basis, an especially difficult task given that American ideas of marriage indisputably have been shaped by the Jewish and Christian religions.”).

199. *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting). My use of Justice Thomas’s words in *Obergefell* should not be taken to suggest any skepticism that Justice Thomas believes what he said.

200. See *Obergefell*, 135 S. Ct. at 2629 (Roberts, C.J., dissenting).

Hold the rotten eggs and tomatoes until an important objection is addressed. My French-speaking professor began to use “meeting” rather than *rendezvous* because he was trying earnestly to articulate his intended meaning to his students. He was not trying to communicate something that he did not believe, and he was not trying to persuade his students of anything. The usage of constitutional memes that I am offering shares the first feature by hypothesis. In the *Obergefell* hypothetical, the judge is trying to communicate a proposition of constitutional law that the judge sincerely believes: the Constitution does not require state recognition of same-sex marriage. The language in which he is doing so has no abstract meaning (as *rendezvous* has no abstract meaning); it has an acquired constitutional meaning that it is rhetorically useful for the judge to invoke. In so doing the judge is engaging the reader as a participant in exposition, as any good translator does.²⁰¹

And as constitutional law requires. The line of division between communication and persuasion is one the epistemology of constitutional law does not recognize. It is widely agreed among constitutional scholars that propositions of constitutional law acquire their permanence through public acceptance.²⁰² As Richard Fallon writes, “the legal legitimacy of the Constitution depends much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questionable) legality of its formal ratification. Other fundamental elements of the constitutional order, including practices of constitutional interpretation, also owe their legal legitimacy to current sociological acceptance.”²⁰³ If this is true, then successful rhetoric is a legal obligation of a constitutional judge.²⁰⁴

201. Cf. Fuller, *supra* note 34, at 383 (“The desire to keep the form of the law persuasive is frequently the impulse to preserve a form of statement which will make the law acceptable to those who do not have the time or the capacity for understanding reasons which are not obvious—and this class sometimes includes the author of the statement himself.”).

202. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 653 (1987) (arguing that the legal authority of judicial precedent rests on public acceptance).

203. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792 (2005).

204. Whether the structure of knowledge in legal domains outside of constitutional law imposes similar obligations on adjudicators is beyond the scope of this Essay. Cf. H.L.A. HART, *THE CONCEPT OF LAW* (1961) (developing and defending a distinctive approach to legal positivism).

CONCLUSION

Constitutional memes are entrenched—indeed, are self-reinforcing—but they are not permanent. It was once hornbook law that rights could be divided into distinct civil, political, or social rights.²⁰⁵ We no longer think of rights in those terms, and the categories were overlapping and internally inconsistent even during Reconstruction, the heyday of the tripartite scheme.²⁰⁶ This change in legal understanding did not occur because of an intervening constitutional amendment, Supreme Court decision, or other change in substantive constitutional law. What changed was the conventional public expression of rights, as the language of rights increasingly came to represent an aspiration towards universal moral equality. Substantive due process might not always be thought incompatible with the constitutional text, and indeed this Essay can be understood, in part, as a step towards that end.

That said, the Essay is itself a paradox. It seeks to expose fallacies in the textual argument against substantive due process but it is neither a defense of substantive due process as a constitutional doctrine nor even a criticism of the textual argument. The way to square this circle is to understand the Essay as a kind of defense of fallacies. Constructing and relying upon constitutional memes that serve one's rhetorical purposes is part of what it means to advance arguments in the real world that constitutional law regulates. Scholars can and should deconstruct old ideas, but judges may be forgiven if they haven't the time.

205. See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 154 (1999).

206. See *id.*